XIII

# REPORT

OF THE

# LEGAL REMEMBRANCERS,

## NORTH-WESTERN PROVINCES,

FOR 1866-67.

Allahabad:

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1867.

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OF THE

# LEGAL REMEMBRANCERS,

## NORTH-WESTERN PROVINCES,

## FOR 1866-67.

No. 624 OF 1867.

FROM

W. C. PLOWDEN, ESQUIRE,

*Secretary to the Board of Revenue,*

*North-Western Provinces, Allahabad,*

To

R. SIMSON, ESQUIRE,

*Secretary to the Government of the*

*North-Western Provinces.*

DATED ALLAHABAD, THE 15TH AUGUST, 1867.

SIR,

REVENUE.

*Present*

C. B THORNHIL, ESQ, C.S.I.
R. N. CUST, ESQ.,

THE Board of Revenue, as Legal Remembrancers, have directed me to submit, for the information of His Honor the Lieutenant-Governor, their Report on the litigation in which Government has been a party during the year 1866-67.

2. The Divisional Reports were received on the following dates :—

| | |
|---|---|
| Allahabad, | ... dated 14th June, 1867. |
| Rohilkund, | ... dated 8th July, 1867. |
| Benares, | ... dated 8th July, 1867. |
| Meerut, | ... dated 13th July, 1867. |
| Agra, | ... dated 1st August, 1867. |

It will be observed that the Board are not to blame for the delay which has occurred in the submission of the present Report. The Board regret to note that in Agra, where there was the least litigation, the report by the Commissioner has been longest delayed. This delay is the more reprehensible, as reminders had been issued from this Office shortly after the close of the year, pointing out both to Commissioners and Collectors that the Civil Suit Statements were required on the 1st May, and that they should be submitted without delay.

3. The total number of cases in which Government has been a party during the eleven months under report is 348, against 344 for the twelve months of the previous year. Of these, 248 were instituted during the eleven months, against 253 in the twelve months of the previous year, and 100 were pending at the close of last year.

4. Bearing in mind that the Report for this year deals only with eleven months of the year, while that for the previous year referred to the entire twelve months, there is a comparative increase in the number of suits which have been instituted in the year under report.

5. The accompanying statement shows the results of the litigation during the year, and a classification of the suits :—

A.

| | Government, Plaintiff. | | | | | | | Government, Defendant. | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Pending. | Instituted. | Decided | | Percentage | | | Pending. | Instituted. | Decided | | Percentage | | |
| | | | For Government. | Against Government. | For Government. | Against Government. | | | | For Government. | Against Government. | For Government. | Against Government. | |
| Original Suits, ... | 5 | 14 | 15 | 1 | 93·8 | 6·2 | | 47 | 112 | 75 | 30 | 71·4 | 28·6 | |
| Appeals—Regular, ... | 3 | 41 | 2 | 33 | 5·7 | 94·3 | | 19 | 35 | 28 | 10 | 73·7 | 26·3 | |
| " —Special, ... | ... | 4 | ... | 3 | ... | 100· | | 5 | 8 | 9 | 2 | 81·8 | 18·2 | |
| Applications, ... | 14 | 31 | 24 | 2 | 92·3 | 7·7 | | 7 | 3 | 3 | 2 | 60· | 40· | |
| Total, ... | 22 | 90 | 41 | 39 | 51·3 | 48·7 | | 78 | 158 | 115 | 44 | 72·3 | 27·7 | |
| Contract, ... | ... | ... | 8 | ... | 100· | | Contract, ... | ... | ... | 10 | 7 | 58·8 | 41·2 | |
| Exchequer, ... | ... | ... | 2 | ... | 100· | | Exchequer, ... | ... | ... | 6 | 5 | 54·5 | 45·5 | |
| Confiscation, ... | ... | ... | 3 | 6 | 33·3 | 66·7 | Confiscation, ... | ... | ... | 23 | 9 | 71·9 | 28·1 | |
| Wards, ... | ... | ... | 4 | 2 | 66·7 | 33·3 | Wards, ... | ... | ... | 4 | 6 | 40· | 60· | |
| Escheats, ... | ... | ... | ... | 29 | ... | 100· | Escheats, ... | ... | ... | 20 | 9 | 69· | 31· | |
| Costs, ... | ... | ... | 24 | 2 | 92·3 | 7·7 | Set aside orders, ... | ... | ... | 40 | 6 | 86·9 | 13·1 | |
| | | | | | | | Trespass, ... | ... | ... | 8 | ... | 100· | | |
| | | | | | | | Costs, ... | ... | ... | 3 | 2 | 60· | 40· | |
| | | | 41 | 39 | | | | | | 114 | 44 | | | |
| | 22 | 90 | | | | | | 78 | 158 | | | | | |
| | Pending. | Instituted. | | | | | | Pending. | Instituted. | | | | | |

6. A classification of the suits by divisions is also given in Statement B.—the upper line against each division shewing the suits in which Government is defendant, the lower line those in which Government is the prosecutor.

B.

| | Contracts. | Exchequer. | Confiscation. | Wards. | Escheats. | Set aside orders. | Trespass. | Costs. | |
|---|---|---|---|---|---|---|---|---|---|
| Meerut, ... | 11 / 6 } 17 | 0 / 1 } 1 | 6 / 3 } 9 | 3 / 2 } 5 | 7 / ... } 7 | 4 / ... } 4 | ... / ... } ... | ... / 15 } 15 | 58 |
| Rohilkhund, ... | 4 / 1 } 5 | 2 / ... } 2 | 31 / 7 } 38 | ... / ... } ... | 6 / 28 } 34 | 13 / ... } 13 | 3 / ... } 3 | 6 / 14 } 20 | 115 |
| Agra, ... | 3 / ... } 3 | 8 / ... } 8 | 1 / ... } 1 | ... / ... } ... | 16 / ... } 16 | 5 / ... } 5 | 2 / ... } 2 | 2 / ... } 2 | 37 |
| Allahabad, ... | 2 / 2 } 4 | 1 / ... } 1 | 6 / 2 } 8 | 3 / ... } 3 | 8 / ... } 8 | 11 / ... } 11 | 3 / ... } 3 | ... / 11 } 11 | 49 |
| Benares, ... | 3 / ... } 3 | 5 / 1 } 6 | 6 / 1 } 7 | 15 / 10 } 25 | 2 / 3 } 5 | 31 / ... } 31 | 5 / ... } 5 | 2 / 5 } 7 | 89 |
| Total, ... | 32 | 18 | 63 | 33 | 70 | 64 | 13 | 55 | |

7. It will be observed from the first of these statements that the cases in which Government has taken the initiative have increased slightly in number in the year under report. The Government has been plaintiff or appellant in 59 cases, against 20 cases in the previous year, of which 14 were original suits, against nine in the previous year, and the remainder were in appeal. The existence of a High Court, and the consequent more strict adherence to procedure, will probably tend to increase somewhat the number of cases in which Government is the plaintiff, and to diminish those in which the Government is impleaded. Several suits have been brought against Government which have had their origin solely in a disregard of the proper rules of procedure on the part of District Officers; while on the other hand, and especially in cases relating to escheats and crown domains *(Nuzool)*, the Government will occasionally have to go into Court to protect its rights, where formerly orders of the District Officers, which were irregular in form, though equitable in substance, would have served the purpose.

8. Analysing the cases as they appear in the first statement (A.), the following results are obtained:—

Of the 100 pending cases, 52 were original suits, five of which were instituted by Government, and 47 by private individuals against Government: 22 were original appeals, 3 being instituted by Government and 19 against Government; 5 were special appeals, all preferred by private individuals; and 21 were miscellaneous applications connected with costs, in 14 of which Government was the moving party.

Of the 248 cases instituted during the eleven months under report, 126 were original suits, in 14 only of which Government was the plaintiff; 76 were original appeals, in 41 of which Government was the appellant: and 12 were special appeals, in four of which Government was the moving party. The remaining 34 cases were miscellaneous applications, generally for realizations of costs, in 31 of which the initiative was taken by Government.

9. The number of regular appeals in which Government took the initiative has been large. There were, however, 28 cases in one district (that of Bareilly) which really involved one issue,—the right of Government to the buildings erected at Pilleebheet by the native Government which it had succeeded.

10. Owing to the mode in which the classification of cases was prepared last year,—the cases compromised being excluded from the percentages of decisions for and against Government,—it is not possible to make a strictly accurate comparison between the results of last year and those of the eleven months under report. In future the cases compromised will be shown in the percentages as they are now, and as they have been in all former years excepting 1865-66, according as the compromise has been in favor of or against Government. This, though the cases in question may not have come to an actual decision, is the more correct method of ascertaining whether litigation has been in favor of or against Government.

11. The actual number of cases compromised during the past eleven months has been 17, of which 11 were compromised in favor of Government, and six against Government.

12. Excluding those results in the year 1865-66 where cases have been compromised and excluded from the calculations,—where, consequently the percentages of cases resulting in favor of or against Government have not been accurately shown,—the subjoined statement shows the comparative results of the litigation in which Government has been interested during the past four years :—

| | 1863-64. | 1864-65. | 1865-66. | 1866-67. |
|---|---|---|---|---|
| Original suits, ... ... ... ... | 74·6 | 58·18 | ... | 74·4 |
| Appeals—Original, ... ... ... ... | 88·2 | 80· | ... | 47·6 |
| „ —Special, ... ... ... ... | 85·7 | 85·7 | 100· | 64·3 |
| Applications,... ... ... ... ... | 100·0 | 76·7 | 85· | 80·1 |

13. It will be seen from this that in the original suits the results are satisfactory. Practically, in three out of every four cases in which Government was a party, the verdict was in favor of Government. In the Appellate Courts, however, the results are by no means so satisfactory. In original appeals the Government was more often cast than victorious, though the difference between the cases in favor of Government and those against it is small. In special appeals the Government has had the best of it, gaining its cause in 64 per cent. of the cases tried.

14. It is the Bareilly cases already alluded to which have so affected the results of the original appeal cases. They will be noticed further on.

15. Excepting the original appeal cases, the results of the litigation in which Government has been engaged is satisfactory.

16. The following is a classification of the cases in which Government has been a party according to the nature of the claim involved :—

Sixty-three cases were connected with the events of 1857, and subsequent confiscations, of which 41 were decided,—26 for, and 15 against, Government.

Seventy cases related to escheats and Crown domains, of which 58 were decided,—38 (including the twenty-eight Bareilly cases) against Government, and 20 for Government. Sixty-four cases were connected with the orders of Administrative, Settlement, or Magisterial Officers, whose awards it was sought to set aside; 46 cases were decided,—40 for, and 6 against, Government.

Thirty-two were based on breach of contract, of which 25 were decided,—18 for Government, and 7 against.

Eighteen were connected with exchequer cases (revenue balances), referring generally to Excise and Ferry Dues, of which 13 were decided,—eight for, and five against, Government.

Thirty-three cases concerned Government only in so far as it represented the interests of minors and others whose estates were under the Court of Wards : of these, 16 were decided—eight for, and eight against, the wards.

There were 18 cases of trespass brought against Government Officers, of which eight were decided, and all in favor of Government.

The remaining 55 cases were miscellaneous applications, principally relating to costs, of which 31 were decided—27 for, and four against, Government.

17. Rohilkund again exhibits the greatest amount of litigation, and Agra again stands lowest on the list. It is somewhat remarkable to find the latter division the only one in which Government has instituted no suits, either original or in appeal.

18. The divisions rank as follows in regard to the number of cases under trial :—

| | 1866. | 1865. |
|---|---|---|
| Rohilkund, ... ... ... ... ... ... ... | 115 | 100 |
| Benares, ... ... ... ... ... ... ... | 89 | 95 |
| Meerut, ... ... ... ... ... ... ... | 58 | 55 |
| Allahabad, ... ... ... ... ... ... ... | 49 | 58 |
| Agra, ... ... ... ... ... ... ... ... | 37 | 36 |

In Kumaon and Jhansie, as usual, there has been no litigation in which Government has been a party.

19. Meerut and Allahabad, it will be observed, are the only two which have changed places. The character of the litigation remains much the same in the several divisions. In Rohilkund there was the greatest number of cases connected with the events of 1857, while in Benares, as in former years, the great bulk of the litigation was either to set aside ordres (31 cases), or in connection with wards' estates (25 cases). Statement B. gives full information on this subject, and it is unnecessary to comment further upon the details there shown.

20. The amount of costs incurred, awarded, and recovered during the year is given in the accompanying table :—

| Division. | Incurred. | Awarded. | Recovered. |
|---|---|---|---|
| | Rs. As. P. | Rs. As. P. | Rs. As. P. |
| Meerut, ... | 3,080 3 7 | 4,137 6 3 | 1,156 13 8 |
| Agra, ... | 3,941 10 2 | 3,844 8 2 | 982 4 10 |
| Rohilkund, ... | 10,571 5 8 | 1,020 12 6 | 2,127 5 9 |
| Allahabad, ... | 7,964 0 0 | 6,333 1 7 | 2,419 1 9 |
| Benares, ... | 7,606 1 3 | 4,301 14 7 | 3,219 15 1 |
| | 33,163 4 8 | 19,637 11 1 | 9,905 9 1 |

21. In future Reports the Board will only notice the costs in the decided cases : the practice of showing all costs incurred, whether the case may have been decided or not, and comparing with it the sums awarded and recovered, is likely to lead to erroneous conclusions.

22. It remains only to notice those cases which, either from the circumstances which gave rise to them, or the legal points involved in them, may be of interest.

23. The case noted in para. 32 of Mr. Officiating Secretary's letter of the 28th August last, has, with the sanction of Government, been appealed to the Privy Council, and will be noticed when the results of the appeal are known. The following memorandum was forwarded to Mr. Forsyth, the Standing Council to the Secretary of State for India, in order to aid him in prosecuting the appeal.

Mussumat Khanzadee Begum *versus* Collector of Boolundshuhur.

"MEMORANDUM.

"The Government is appealing against the decision of the High Court dated 2nd "July, 1866, which overrules the judgment of the Lower Court (Judge of Meerut), dis- "missing the claim of Khanzadee Begum to recover five villages, of which she had been "put in possession by order of the Board of Revenue dated 28th July, 1860, but from "which she was dispossessed by order of the Government, North-Western Provinces, "362 A., dated 16th November, 1861.

"The decision in appeal alleges that respondent (Khanzadee Begum) 'obtained "'possession of these villages with the deliberate approval and sanction of the Govern- "'ment, expressed through the Board of Revenue.'

"That 'the plaintiff's (Khanzadee Begum's) proprietary right in the particular "'villages then arose, unless it can be shown that such approval and sanction were "'unduly obtained.'

"That 'the alleged refusal of sanction is completely disproved by the official cor- "'respondence.'

"And the Court added—

"'Unless we are to distinguish between the sanction of the Board of Revenue and "'the sanction of the Government, and to hold that nothing short of the express "'sanction of the Government would be sufficient to the appropriation of the particu- "'lar village, we must hold that after the letter of July, 1860, no right of interfer- "'ence remained with the Government.'

"The letter referred to is given below :—

"'*To the Commissioner of the Meerut Division* (*No.* 478).—*Dated* 28*th July*, 1860.

"'SIR,—I have the honor, by direction of the Sudder Board of Revenue, to ac- "'knowledge the receipt of your docket No. 449, dated 20th in- "'stant, and, in reply, to convey their sanction to the assignment "'to Khanzadee Begum of the villages noted in the margin, "'Zillah Boolundshuhur, in satisfaction of the orders of the Spe- "'cial Commissioner's Court at Meerut.

Freeda Moradpore.
Busee.
Nizamporc.
Bhirkoun.
Mobarikpore.

"'W. H. LOWE,

"'*Secretary.*'

"Here it is obvious there is no deliberate approval and sanction of the Government "expressed through the Board of Revenue, and, had the Board's sanction been qualified "by the addition of the words 'subject to the confirmation of Government,' it is clear "that no erroneous interpretation could have been put on the letter in question.

"No sanction of Government having been given, were the Court to 'distinguish "'between the sanction of the Board and the sanction of the Government?'

"We hold that the Court were so bound, notwithstanding the letter of the 28th "July, 1860, quoted above.

"A consideration of the practice of the Board and Government will show that such "a distinction must be made, that the orders of the Board—the consequent action of the "Collector, putting Khanzadee Begum into possession of the five villages, from which "she was afterwards evicted by order of the Government—were in no way of any effect "against Government until sanctioned by Government.

"The property of which these five villages formed a part was confiscated property.

See Appendix B.

"The Government orders in regard to the mode of dealing with "such property provide that statements in a certain form shall be "drawn up, showing all property of this nature, which shall be submitted to the Board of "Revenue, who will lay them before the Government for orders.

" But not only in these particular cases of confiscated lands, but in all cases, the " sanction of the Board to disposition of landed property is, and has always been, provi- " sional on and subject to the confirmation of Government. Even the alterations in the " Revenue-rolls of estates which may be necessary from time to time are sanctioned by " the Board subject to the approval of Government, and it is this conditional sanction " which is conveyed, though not expressly stated in the letter referred to by the Court. " The Board's sanction is sanction *quâ* the Board only, and is always so understood.

" The Government has never delegated to the Board a power of granting away land, " nor has the Board ever assumed such power—in fact, the former Viceroy, Lord Can- " ning, went so far as to doubt his own power as Viceroy to grant away land the pro- " prietary right in which vests in the Crown. The correspondence in Appendix A. will " throw light on this point.

" If, then, the Court are bound to distinguish between the sanction of the Board " and the sanction of Government,—and that such a distinction is necessary will be ap- " parent from the orders of the Governor-General contained in Appendix B.,—the deci- " sion of the Lower Court in favor of Government should not have been upset.

" It is to be observed that that decision was given by a Judge who was one of the " Special Commissioners who tried the case in which Mussumat Khanzadee Begum " obtained the order for maintenance, on which order she bases her claim to these " particular villages.

" The order of the Special Commissioner was *ultra vires*, and was in fact a nullity, " having been passed by a Court which did not consist of three Judges, as required by " law (Section 2, Act IX. of 1859; Section 12 of ditto; Section 1, Act XII. of 1843), " and the Courts have themselves recognized the invalid nature of the decree in ques- " tion, as the Judge of Meerut recorded in his decision that all the proceedings of the " Special Commissioner had been incorrect, from first to last.

" The following papers relating to the case are submitted for information :—

" Appendix A.

" Appendix B.—G. O. No. 299, dated 10th April, 1858.

" 1. Copy of Special Commissioner's decree.

" 2. Do. of Statement of value of the two properties.

" 3. Do. of Board's letter to Government No. 733, dated 7th October, 1861.

" 4. Do. of Government Order No. 362A., dated 16th November, 1861.

" 5. Do. of Board's address to Government No. 483, dated 14th August, 1866.

" 6. Do. of Government Order No. 265A., dated 30th August, 1866.

" 7. Do. of Decision of Judge of Meerut.

" 8. Do. of High Court's Decision.

" There is no official correspondence which will bear out the allegation of the deci- " sion appealed against, ' that the alleged refusal of sanction is completely disproved.'

" Sanction of the Government had not been obtained when it was discovered that " the property made over by the Collector to Khanzadee Begum was largely in excess of " that which the Special Commission had decreed for her. This was represented to " Government, and the Government declared its right to revise the proceedings of the " Board and the Collector—thus implying its refusal to sanction the course adopted by its " subordinates. The Government did not expressly dwell on the fact of their sanction " not having been granted in their official correspondence with the Board, because it was " well known to the Board that such sanction had not been obtained, as the confiscation

" statements to be submitted to Government for their sanction to the disposal of confis-
" cated properties were not ready for submission. The whole question turns upon the
" meaning of the Board's letter conveying their sanction to the assignment of the five
" villages from which Khanzadee Begum was afterwards ejected. The meaning of that
" letter the Government hold to be clear: it was a sanction by the Board in the usual
" form—that is, subject to the approval of Government, which in ninety-nine cases out of
" a hundred would have been granted, but which in this case has not been granted."

Manick Chund *versus* Collector of Boolundshuhur, Executor of the late Mr. T. Skinner.

24. The case commented on in para. 34 of last year's Report was decided against Government in appeal to the Commissioner; but the Commissioner's decision has since been reversed by the Punjaub Chief Court.

Collector of Meerut *versus* Jumayet Ali and others, pleaders.

25. This case, which will be found at page 116 of the *Revenue Reporter* for June, forms a useful precedent where Government has to realize costs and the value of stamps in suits where plaintiff has been allowed to plead *in formâ pauperis*, and the conduct of the Government Pleader in this case has already been favorably noticed.

Collector of Moradabad *versus* Mussumat Doorga.

26. This case, which has been decided against Government by Mr. Lindsay, Judge of Moradabad, is remarkable more for the judgment which has been pronounced on it than for its intrinsic merits. It is an ordinary case of Government claiming property of which the late owner has died intestate and without heirs.

The following is the Judge's decision :—

" *The* 13*th September*, 1866.

" *Present :*

" C. R. LINDSAY, ESQUIRE, *Judge of Moradabad.*

" The Collector of Moradabad, on the part of Government, Plaintiff,

" *Versus*

" Mussumat Doorga and others, Defendants.

" THE *Shashtras* shew that under certain conditions an estate may escheat to
" the Rajah. The word ' Rajah ' means the ruling power upon which the duty of
" Government has devolved—see the *Mitacshra*, Chapter I., Section 1, Clause 5.

" Now is it necessary that the ruling power must be of the Hindee faith ?

" May not a Christian Government claim property as an escheat to the ruling power ?

" I do not find that the *Shashtras* expressly state that the ruling power must be of
" the Hindee faith, though it may be urged fairly enough, and reasonably, that the *Shash-*
" *tras* did not contemplate a foreign power as the ruler of the land ; but, supposing that
" they did not contemplate the fact, and that the Hindee law does not accommodate it-
" self to the altered state of affairs, still I think Government can come into Court, under
" the provisions of Section 9, Regulation VII. of 1832, extended to British India by
" Act XXI. of 1850.

" By Section 9, Regulation VII. of 1832, the Hindoo or Mahomedan law shall not
" be permitted to operate to deprive a party of property to which, but for the operation
" of such laws, it would have been entitled. Decisions are to be governed in such cases
" by the principles of justice, equity, and good conscience. The introduction of Eng-
" lish law in the disposal of such cases is not permitted.

" Now in this case the plaint sets forth that by Hindee law the claim is a good one,
" and must be enforced. The general principles of equity, good conscience, and justice

" are not made the basis of the suit—Hindee law alone is the foundation of the claim. " To the law, then, I must turn in the first place, and subsequently justice, equity, and " good conscience shall be taken into consideration, though the plaint does not even " faintly allude to those principles.

" Now, can this suit be maintained under the Hindee law? I think not. Mac- " naghten, after enumerating the various heirs to an estate, says that ' in default of " ' them, the *Acharya*, or spiritual preceptor, the pupil, fellow student in theology, " ' learned Brahmins ' inherit; and lastly, always excepting the property of Brahmins, " the estate escheats to the ruling power.

" This law, it may be said, virtually excludes the ruling power from succeeding to " property, on the ground that it is an escheat. And so argues Counsel for the defend- " ant, for, reasonably, it must be allowed that there are many learned Brahmins alive " who might put in a claim and have a better ground of claim as successors to the pro- " perty of a deceased Hindoo.

" Counsel for the Government meets this view of the case by stating that Govern- " ment should make such heirs a party to the suit under Section 73, Act VIII. of 1859; " that, as none of the said heirs have appeared nor put in a claim, this suit should not be " decided against Government, because there may be, and are, in existence learned Brah- " mins or other heirs enumerated in *Shashtras*. As Government pleads under the " Hindoo law, its case *primâ facie* is a bad one. The learned Brahmins are in existence. " Section 73, Act VIII. of 1859, does not compel a Civil Court to implead third parties.

" A Court generally takes the case as placed before it by the parties. It may, for " the ends of justice, or where it is expedient, implead others. The necessity has not " arisen in this case—in fact, it would be impossible to do so. Counsel argues that, " because the heirs enumerated by Macnaghten keep aloof, his title to the lands in " suit as against the defendant is a good one.

" This appears to me a very curious argument. The justice of it is not apparent; " certainly it is not logical. A bad or a weak title is not made good or stronger by the " fact that persons who have a legal and a better claim keep aloof, and do not press it. " Every claim must stand or fall on its own merits.

" If A. holds property belonging to B., the rightful owner, and B. for good reasons " does not see fit to press his claims, would any English Court of Justice give C., the " reversioner, possession of the property during B.'s life-time, on the ground that A. is " not the lawful possessor of it, and that C. is the legal successor? Such a result cannot " be contemplated for a moment.

" Now Government, the ruling power, by Hindoo law (the law under which this " suit is brought) is not the legal successor to property until all the heirs enumerated in " the *Shashtras* are not to be found; and it has no more right to claim the property " in suit whilst any one of those heirs is living than C. has to claim from A. land which " reverts to him after the death of B.

" Mussumat Doorga's title, under the circumstances of this case, is as good as that " set up by the Government, and, where the right is equal, ' *potior est conditio pos-* " ' *sidentis.*'

No. 747, 12th Sept., 1865.
„ 174, 13th Aug., 1864.
Case No. 5, Vol. 11, *Macnaghten's Hindoo Law.*

" The judgments of the late Sudder Court noted in the " margin have been brought to my notice by Counsel for the " Government: they are not applicable to this suit.

" The first case refers to suits lodged under the provisions of Regulation XIX. " of 1810.

" In the second case the Sudder Court merely say that the plaintiff is not the heir; " that in default of other heirs, the estate escheated to Government. The line of defence

" urged by the defendants' Counsel was not taken, nor even contemplated, in that case. " A case given in the the 11th Volume of Macnaghten is also cited by Counsel for " Government. That case shows that the ruling power was in possession, and that a " certain claimant came forward, not one of the class enumerated in the *Shashtras*. " This claim was held to be bad.

" The maxim '*potior est conditio possidentis*' may be applied to that case. No " other cases have been brought to my notice, and I do not know of any decision that " meets the points raised in the first issue of this case. Counsel for the defendant further " contends that Mussumat Doorga is the rightful heir, and that Government is stop- " ped from preferring this suit by its own acts.

" Kishun Lall was the last male proprietor of the estate in suit. He admitted Mus- " sumat Buntee, mother of Mussumat Doorga, to a share in a portion of his property " (see the judgment of the Zillah Court, Moradabad, dated 7th August, 1837). After " his death Mussumat Buntee, Mussumat Maharanee, and Mussumat Myna, the widows, " Mussumat Myna, the mother of Kishun Lall, and Mussumat Punnoo, came to an agree- " ment by means of arbitrators. Mussumat Punnoo was to retain one-third, and the " other ladies two-thirds of the property left by Kishun Lall (see award dated 11th " March, 1844).

" In 1851, certain villages amongst the property in suit were given by Gov- " ernment to Buntee and others. In 1862 the Collector purchased property from Mus- " sumat Buntee. Her proprietary possession was admitted by the Collector, Mr. Stra- " chey, on the 3rd July, 1863.

" The Collector admitted that Doorga was the heir of Buntee in November, 1864, " and he gave possession, which possession was, I have reason to believe, confirmed " by the Commissioner.

" Mussumat Buntee, with others, has also been admitted by the Sudder Court at " Agra as one of the heirs of, and among the nearest of kin to, Kishun Lall. That " Court accepted the award dated 11th August, 1844, as a correct document (see its " decision No. 34, dated 23rd July, 1864).

" Counsel for Government contends that all these proceedings are of no weight; " that Government cause of action arose only at the death of Mussumat Myna, the " mother of Kishun Lall, in June, 1865.

" Counsel for the defence contends that, if Government has any cause of action at " all, it arose when the widow of Kishun Lall died, and that the suit is therefore barred.

" In my opinion the suit of Government as against property that belongs to Mus- " sumat Buntee is barred. Counsel pleads the sixty years' limitation, but the ground " on which he claims for his client a right that would not be accorded to any other " claimant for an inheritance I do not see.

" Mussumat Doorga, as the daughter of Mussumat Buntee, has a legal right to " inherit the property that belonged to her mother (see *Macnaghten on Inheritance*); " and when the Collector in 1864 admitted her legal right and gave back to her posses- " sion from which she had been ousted, he did a just and a legal act.

" I think this suit is barred by the twelve years' limitation statute, and by the " action of the Government through its own officers. I also think the possession of " Mussumat Buntee was legal, and her proprietary possession as one of the successors " and heirs of Kishun Lall has been admitted by the highest Court in the North- " Western Provinces. What more can be required to give a good title?

" I will now consider the question in the light of justice, equity, and good con- " science;—and here let me observe that the first reason given by Counsel for the Gov- " ernment why Doorga cannot inherit is her profligacy. Two points are worthy of notice

" in this reason : first, the want of justice, equity, and good conscience in continuing to " assert that Mussumat Doorga is a bad character, after a competent Court has declared " the contrary. (See the judgment of the Moonsiff of Sumbhul dated 13th April, 1865. " That judgment, so far as the character of Mussumat Doorga was considered at and " previous to the date of its delivery, is a judgment *in rem* good against the world.)'

" It is not pleaded that Doorga's profligacy commenced after that judgment. The " same old story is brought up as was told to the Moonsiff. The judgment of the " Moonsiff may be a good one—it may be a bad one ; but it is final.

" The second point is that when profligacy is pleaded in bar of succession, it is not " unjust inference to draw that, but for her alleged profligacy, the defendants' claim " would be good—at any rate, that the plaintiff had a latent suspicion that her legal claim " was not so bad ; and under such circumstances to charge the defendant with profligacy " in the face of the Civil Court's judgment dated 13th April, 1865, seems to me doubly " unjust. Next it is foreign to my notion of justice, equity, and good conscience to " admit the proprietary possession of a person to buy property from him as the legal " owner, to accept as valid and legal arrangements made by that person and others for " the division of their property, to note in the Government records the proprietary " right of that person, and subsequently to come into Court and say that all these " proceedings are invalid, irregular, illegal, of no force ; yet this is the line of argument " taken by Counsel for the Government in the matter of the proprietary title of Mussu- " mat Buntee.

" It is against my view of justice, equity, and good conscience to admit the legal " right of a person, and to give him possession as the lawful heir, and shortly afterwards " to oust him, and, when possession has been restored by a competent Court, to bring a " regular suit to oust the occupant of the property and to prove that he has no legal right " thereto. Yet this is the course taken by Government against Mussumat Doorga.

" Whether I look at this case from a purely legal point of view, or view it in the " light of justice, equity, and good conscience, the result is the same.

" The Government has not in my opinion the slightest legal or equitable ground " of action.

" I am constrained to say I think the Government has dealt very hardly with " Mussumat Doorga. By an act in its executive capacity it forcibly took from her the " property in suit. The Civil Court cause the restoration of the property, pointing " out at the time that there were good grounds for not interfering with her possession.

" Notwithstanding, this suit has been brought, and I think it would have been " well had it never been lodged. The suit is dismissed, with costs.

(Sd.) " C. R. LINDSAY,
" *Judge.*"

The grounds on which an appeal was recommended will be found in the accompanying letter from the Commissioner :—

*From* JOHN INGLIS, ESQUIRE, *Commissioner of the Rohilkund Division, to* W. C. PLOWDEN, ESQUIRE, *Secretary, Board of Revenue, N. W. P.* (No. 539).—*Dated Bareilly, the 30th October*, 1866.

Government *versus* Mussumat Doorga.

" SIR,—I have the honor to submit, for the orders of the Board of Revenue, " the accompanying letter No. 454, dated 10th October, " with its enclosures, from the Collector of Moradabad, " referring to the suit noted in the margin.

" 2. This suit was instituted in accordance with the orders of the Board " No. 200, dated 22nd May, 1866.

3. " The Judge of Moradabad has dismissed the claim made by Government on " three grounds :—

" 1*st*,—That the suit is barred by the statute of limitation.

" 2*nd*,—That Mussumat Doorga has made good her claim.

" 3*rd*,—That Government has no title to property left by Hindoos dying " without natural heirs, as long as learned Brahmins can be found.

" 4. I think that an appeal may be made against this decision, on the follow- " ing grounds :—

" First,—That the claim of Government arose on the death of Mussumat Myna, " on the 19th June, 1865, and that therefore it is not barred by lapse of time, for " the whole property acquired by the common ancestor, Samadhan, devolved on the " last surviving heir, Kishun Lall, his grandson. On Kishun Lall's death, his mother " Myna, his widow, Myna, and his brother's widow, Buntee, and Mussumat Punnoo, his " uncle's widow, quarrelled regarding the distribution of the property, to which there were " no other heirs. Their differences were settled by *Punchayet* in March, 1844. Mussumat " Punnoo then died. Khoshal Chund, her nephew, sued on a deed of gift executed by her, " to set aside a certificate given under Act XIX. of 1841 to the others (the two Mynas " and Buntee), stating in his deposition that he was an adopted son. This claim was dis- " missed by the Sudder Court, on the ground that Mussumat Punnoo had no right, " under the award of the *Punchayet*, to alienate any part of the property.

" Myna the mother and Myna the widow of Kishun Lall, and Buntee, the wi- " dow of Kishun Lall's brother, Ruttun, then held the property jointly.

" Myna, Kishun Lall's widow, and Buntee, his brother's widow, subsequently died, " leaving in 1863 Mussumat Myna, Kishun Lall's mother, in possession of the whole " property.

" During Mussumat Myna's life time she was in sole possession of the property, " and at her instance the name of Mussumat Doorga (defendant in the present suit) " was entered in the Malgoozaree Register as successor to Mussumat Buntee, her mo- " ther; but Mussumat Doorga never obtained possession, and received only a charitable " allowance of Rs. 12 a month.

" 5. Thus the right of Government to succeed accrued on the 19th June, 1865, " the date of the death of Mussumat Myna, the last sole possessor of the property.

" 6. Secondly,—As to Mussumat Doorga's claim, she claims to inherit—

" 1*st*,—As heir of Mussumat Myna her grandmother. But Mussumat " Doorga is not the heir of Myna,—her mother, Buntee, having no claim to succession. " Mussumat Buntee's husband, Ruttun Lall, died before his brother, Kishun Lall, who " succeeded to the whole property. If Mussumat Buntee had no claim to succession, " her daughter, Mussumat Doorga, can derive none from her.

" 2*nd*,—She claims to inherit as heir to Mussumat Myna under a will. " But under the terms of the award of the *Punchayet*, upheld by the Sudder Court " in the claim brought by Khoshal Chund, none of the four women had power to alienate " the property. Moreover, Mussumat Myna subsequently executed a second will in " favor of a boy named Moolchund, by which she revoked the first in favor of Mussumat " Doorga. If, as Mussumat Doorga pleads, Mussumat Myna had power to dispose of " the property by will, her second will supersedes the first.

" 3*rdly*,—Mussumat Doorga claims to succeed because her name was entered " in the Malgoozaree Register as heir to Mussumat Buntee.

" This entry was made at Mussumat Doorga's request, when she was in posses- " soin of the whole property. The order was not of a judicial character, and carried no

" title with it. Moreover, it was never acted on, and Mussumat Doorga was never put " in possession of any part of the property; she merely received a compassionate " allowance of Rs. 12 a month.

" 7. Consequently, the three grounds on which Mussumat Doorga bases her claim " being invalid, she has no title whatever.

" 8. Thirdly,—as to the right of learned Brahmins to succeed in preference to " Government.

" The Judge says,—' If A. holds property belonging to B., and B. for good reasons " ' does not see fit to press his claim, would any English Court of Justice give C., the re- " ' versioner, possession of the property during B.'s lifetime, on the ground that A. is not " ' the lawful possessor of it, and that C. is the legal successor. Such a result cannot be " ' contemplated for a moment.'

" Here A. represents Mussumat Doorga, B. the learned Brahmins, and C. the " British Government.

" 9. If this ruling is correct, the State can never succeed to property left by " Hindoos dying without natural heirs; but this is opposed both to the *Shastras* and to " the precedents of the Sudder Court.

" I have, &c,

(Sd.) " JOHN INGLIS,
" *Commissioner.*"

27. The Board sanctioned the appeal,—the right of the Crown to the kind of property involved in this suit being clear (several explicit dicta on the subject being found in the text-books—see Nareda), and it being only in reference to the property of Brahmins that the claim of the Crown would fall to the ground under Hindoo Law. The results of the appeal will be noted when the case is decided.

28. This case, which was noticed in para. 41 of the Report of last year, has, with the 25 other cognate suits, been appealed to the High Court; but the results have been unfavorable, the Court holding that regular proceedings should have been taken by Government to establish its right and title to the property in question.

Ghasee Ram *versus* Collector of Bareilly.

The decision of the High Court is given below :—

HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN PROVINCES.

*Dated Agra, 11th December*, 1866.

(CIVIL SIDE) APPELLATE JURISDICTION.

*Present :*

THE HON'BLE SIR WALTER MORGAN, KNIGHT, *Chief Justice.*

and

THE HON'BLE F. B. PEARSON, *Judge.*

CASE NO. 94 OF 1866. { *Regular appeal from the decision of H. Vansittart, Esq., Judge of Bareilly, dated the 3rd April*, 1866.

Collector of Bareilly (Defendant), Appellant,

*versus*

Ghasee Ram (Plaintiff), Respondent.

" THE judgment appears to us to be right. It determines nothing between the " Collector of Bareilly and the plaintiff, Ghasee Ram, as to their respective rights in either " house or land. Its effect is merely to decide that what is called, the ' proclamation or " ' order of the Deputy Collector dated the 13th April, 1865,' can have no legal operation " to the prejudice of the plaintiff or his rights. If the land on which the house in

" question has been built is Nuzool land, or if the house is liable to be dealt with in the " summary mode proposed in the order (that is, to be sold in a certain event at a price " fixed by the Deputy Collector or his subordinates), it is for the Collector to obtain from " the Courts an adjudication of those rights before proceeding thus summarily. That " the land is Nuzool land may possibly be hereafter duly shown by the Collector in a " proper suit. At present all that appears is, that the plaintiff has for very many years " held the house without any recognition whatsoever either of the Government or the " public, either in the house or the land on which it stands. That the land is entered " in a registry of Nuzool lands in 1842 is the only ground relied on to show that it is " Nuzool. No acts of ownership or other assertion of right are proved on the part of the " Government as to this land. Even if the plaintiff or his ancestors, having no right " to the land, have built a house thereon, this house he has been permitted for a consi- " derable number of years to hold unmolested, and we should at least give this much " effect to a long undisturbed possession as against an antiquated claim, that the pos- " sessor should be protected against a proceeding such as that of the Deputy Collector.

" That order wholly ignores the plaintiff's right, and calls on him within one " month to pay the price fixed as the value of the house, and, in default of his so doing, " declares that the house shall be sold by auction.

" When the Collector has duly established has rights in the property, he will be in " a position to dispose of such rights in any lawful manner. The order from which the " Judge's decree protects the plaintiff is an order framed on the assumption that the " Collector possesses a power of dealing with the house which there is nothing in the " evidence to support.

" We dismiss the appeal, with costs, and interest at 6 per cent.

(Sd.) " W. MORGAN,
" *Chief Justice.*

(Sd.) " F. B. PEARSON,
" *Judge.*"

29. The Board have called on the Collector to report whether he can bring forward such evidence as to the Government title in this property as will justify the Board in authorizing an action against respondent in this case. As the British Government succeeded to the Rohilkund territory in 1817, there is still ample time to establish its rights by suit, should the evidence justify resort to the Courts.

Mukdoom Bux *versus* Collector of Futtehpore.

30. The case noted in the margin, which was referred to in para. 55 of last year's Report, has been decided against Government in appeal to the High Court, following the precedent in the case of Syed Yad Allee and another *versus* Collector of Futtehpore. It is to be regretted that these two cases were originally allowed to proceed to a decision. The facts had not been clearly before the Board, otherwise the cases would probably have been compromised.

31. The suit brought by the Great Eastern Hotel against the Collector of Allahabad requires notice.

" 32. The nature of this case, and the grounds on which judgment was virtually " given against the Collector, are fully set forth in the decision of the learned Judge. " That decision is specially noticeable as applying for the first time in these Provinces " the doctrines and practise of equity law as developed in the English Courts.

JUDGMENT.

" Before I proceed to deliver judgment in this case on the issues framed between the " parties, I think it right to notice an observation of the plaintiffs' Counsel, to which, if " I allowed to pass unnoticed, I might be assumed to accede. Mr. Thomas complains

" of the hardship to which his clients had been subjected by the act of the Collector in " re-entering on the demised premises without bringing a suit; and he stated that if he " had not been acting on behalf of the Secretary of State for India, but only for a private " lessor, he would not have been entitled to do so. I cannot concede the truth of this " statement. I hold that any lessor to whom a right of re-entry has accrued may, if he " can do so peaceably and quietly, re-enter and take possession of the demised property.

" By the breach of the covenant and accrual of the right of re-entry, the term and " interest of the lessee has been forfeited, and the property demised has reverted to the " lessor, against whom (and this a test) no suit for tresspass could be maintained, " because he has re-entered on that which is his own property,

" If, however, the lessor meets with such resistance on the part of the lessee that in " the attempt to recover possession a breach of the peace may be apprehended, it is " then his duty to call in aid the Civil power. The plaintiffs, therefore, cannot com- " plain that they have suffered any hardship on this score.

" With these preliminary observations I proceed to consider the first issue, as to the " necessity of a demand of the rents prior to re-entry.

" By the Common Law of England (which has been in some cases modified by Sta- " tutes 15 and 14 Vic., Cap. 76, Sec. 210) it is necessary for the lessor, before he can " claim forfeiture for non-payment of rent, to demand the rent on the exact day on " which the forfeiture accrued, at the proper place of payment, and at a convenient hour " before sunset: and it is on this principle of the English Common Law that I presume " the petitioners have urged their objection.

" But I am of opinion that I am not at liberty to import into the construction of " contracts made in this country any requirements of the Common Law of England un- " less such requirements have been incorporated into the Law of this country by legisla- " lative enactments or well-established judicial usage, or unless it be clear from the con- " struction of the contract that the parties at the time they entered into it had those " requirements in view, and intended that the contract should be controlled by them. " On this point I refer to the case of Ram Gopal Mookerjee *v.* Musseyk (VIII. *Moore's* " *I. A.*, p. 258.) But assuming in this case the parties had in view the exigencies of the " Common Law of England, I find they have introduced into their contract the very " words which have been inserted in similar contracts in England to avoid the require- " ments of the Common Law above referred to, and to relieve the landlord from mak- " ing a demand for the rent before he could claim forfeiture. The words in the proviso " for re-entry ' whether the same shall have been formally or legally demanded or not ' " can only be interpreted in one sense, and that the sense which has been adopted in " England, namely, as dispensing with the necessity for a demand of the rent. Mr. Tho- " mas contends that these words must be treated as a nullity, but to that contention I " cannot assent. Finding them in the contract, I am bound to give effect to them, and " to give them that effect which it is reasonable to suppose the parties intended they " should have. Under the terms of the contract, then, I hold that no formal or other de- " mand of the rent was necessary to entitle the defendant to re-enter. Has the subse- " sequent conduct of the parties added a condition to the contract, and rendered such a " demand necessary ? I am of opinion that the mere fact that in the year 1864 the Col- " lector sent a notice demanding payment of the rent is not of itself sufficient to create " an allegation on the part of the defendent to make such demands in any subsequent " year, and to debar him from his rights of re-entry if he failed to make such demands.

" The first issue, then, I find in favor of the defendant.

" I now proceed to the second, and as it appears to me the principal, issue in this suit, " *viz.*, whether this Court ought to grant relief to a lessee who has incurred foreiture of " his estate by breach of a covenant to pay rent. On the part of the defendant it has been " argued that the doctrine contended for by the plaintiffs is one that has never been

" recognized in the Courts of this country, and the Government Pleader cited a case " which was decided in the Sudder Dewanny Adawlut of Calcutta in 1853 (320 of 1853, " p. 678) to prove that the contrary principle had been acted upon. In that case a " grant had been made, subject to a condition that the grantor might resume on the " grantee's failing to pay rent for the three kists or instalments, and it was held " that the grantor was absolutely entitled to take possession immediately upon the oc- " currence of the event, and that possession ought to be given up to him at once,—as " no subsequent tender of the money in arrear, and *no intervention of judicial authority,* " *could revive the grant*, which had absolutely become null. This decision is to be sup- " ported on the principle that parties to a contract ought to be bound by the strict " terms with which they have chosen to fetter themselves, and that the law ought " not to make for them another contract, at variance with that which they have made " for themselves.

" Lord Eldon expressed his great dissatisfaction with the decisions of the English " Courts allowing relief in equity against penalties and forfeitures, and dispensing with " the punctilious performance of contracts. I admit that, were this matter entirely new, " I should have felt myself much pressed by these considerations; but the objections of " Lord Eldon and of those jurists who have expressed their dissatisfaction with the doc- " trine which has long been acted upon in English Courts of Equity are ably analysed " and covenanted in Mr. Justice Story's *Treatise on Equity Jurisprudence*, vol. 2, pp. " 528, 529, 530. Both in the cases of penalties annexed to lands and in the cases of " forfeitures for non-payment of rent, Courts of Equity have granted relief on the " ground that,' as the penalty is designed as a mere security of the party who obtains " ' his money or his damages, he gets all he expected, and all that in justice he is " ' entitled to.'

" Lord Eldon, in the case above cited, objected that the subsequent payment of " the sum due, with interest, might be no adequate compensation to the payee for the " injury sustained by him in consequence of the non-payment at the time stipulated, " and that therefore Courts of Equity decree what they presume is a compensation, " but what in a given case is no compensation at all.

" To this objection a reply is made in the note to Mr. Justice Story's text: ' it is " ' there shewn that it applies equally to all cases of the allowance of interest at law as " ' a compensation.' Interest ' may in a given case be inadequate to the particular loss " ' sustained by the creditor;'—but interest is a certain and general rule, adapted to " ordinary circumstances.

" No system of laws could provide for all the remote consequences of the non-per- " formance of any act. Human justice must stop, as it ought, at the *direct and immediate* " *and necessary* consequences of acts and omissions, and not aim beyond a reasonable " indemnification for them. These arguments are adduced to prove that in the gener- " ality of cases an adequate and a fair compensation can be made to the party damni- " fied by the breach of the obligation; and that, so far as penalties and forfeitures " arising merely from the non-payment of money, it is more consonant with ' reason, " ' conscience, and natural equity,' to use the words of Story, to relieve the lessee on the " terms of his compensating the lessor, than to insist upon the penalty of the obliga- " tion, and to cause the lessee to suffer an enormous loss, wholly disproportionate to " the injury to the lessor. These arguments are in my opinion established to great " weight. At the same time, I wish to be understood that I conceive a Court of " Equity, in exercising this remedial justice, ought to consider the particular circum- " stances of the case before it; and that when it is apparent that the breach of the " condition is wilfully persisted in, or persisted in for a considerable period of time, and " is not occasioned by a mere accidental omission, or when no adequate compensation " can be made to the party entitled to claim forfeiture, the Court should hesitate to " give relief. Being, then, of opinion that in certain cases the doctrine of equitable " relief in cases of penalties and forfeitures is consonant with reason, conscience, and " natural equity, am I at liberty to maintain that doctrine in this Court? In the

" absence of express legislative provision; and in cases in which the litigant parties be-
" long to neither of the two principal religious sects of this country, the Courts are
" directed to proceed generally according to justice, equity, and good conscience;
" and although I should hesitate to introduce doctrines (however well approved to my
" own mind) in the face of well-established judicial practice to the contrary, I feel
" myself at liberty, under the circumstances to which I shall presently advert, to pass a
" decision in the present case at variance with that which was cited and relied on by
" the Government Pleader.

" In 1857 the Sudder Dewanny Adawlut of Calcutta, in the case of a bond with
" penalties, admitted and acted upon the same equitable doctrine of relief for which
" the plaintiffs now contend (Ram Gopal Mookerjee *versus* Musseyk, No. 267 of 1855,
" decided 22nd January, 1857, Vol. XIII., part I, pp. 101—105) ; and not only has the
" doctrine subsequently to its condemnation by Lord Eldon been continuously acted
" upon in the English Courts of Equity, but it has been recognised in the English
" Statute Law (15 and 16 Vic., Cap. 76; 23 and 24 Vic., Cap. 126), and, what is
" more in point, the doctrine has been recognized in the legislative enactments of this
" country. By the 78th Section of Act X. of 1859, ' in all suits for the ejectment of
" ' a ryot, or the cancelment of a lease, the decree shall specify the amount of the
" ' area, and if such amount, together with interest and costs of suit, be paid into Court
" ' within fifteen days, execution shall be stayed.'

" I am indebted to my hon'ble colleague, Mr. Justice Roberts, for calling my
" attention to a judgment of Mr. Justice Holloway, of Madras, in which that learned
" Judge expresses his dissent from the principle contended for by Story. The case in
" which that judgment was passed did not concern forfeiture for non-payment of rent:
" the question to be decided in it was, whether a certain stipulation in a contract was
" in the nature of a penalty or liquidated damages (2, *Madras H. C. Reports*, 460).
" Mr. Justice Holloway expresses his dissent from the doctrines upon which the English
" Courts act in suit cases. I am not now called upon to decide whether in such cases
" this Court ought to follow Mr. Justice Holloway's decision or not. Finding that the
" legislature of this country has, in Act X. of 1859, approved of the principle of equit-
" able relief in cases of forfeiture for non-payment of rent, I conceive that I am justi-
" fied in holding that under certain circumstances the Courts of this country may
" grant such relief. The second issue I therefore find in favor of the plaintiffs.

" As to the third issue, I am of opinion that the principles on which the English
" Courts have proceeded in the cases cited in two leading cases in equity (page 912) ought
" to be adopted by the Courts of this country. In those cases it was held that a lessor
" who had re-entered, when called upon to defend his possession, was not restricted to
" proof of the breach of the particular condition under which he had claimed originally to
" re-enter ; but that he was at liberty, if he could do so, to adduce in defence of his posses-
" sion evidence of the breach of other conditions for which the lessee might have been
" ejected. The policy of the Procedure Code of this country is, that all questions relating
" to the subject-matter in dispute between the parties should be determined in one
" suit, and that a multiplicity of suits should be avoided. The Judge before whom a suit
" is brought has cast upon him the duty of framing issues so as to raise all questions re-
" lating to the subject-matter of the suits in respect to which the parties are at variance.
" Were the defendant in the present case restricted to the justification of his possession
" merely on the breach of the covenant for payment of rent, he would, if that question
" were decided against him, be remitted to a new suit to establish his claim to re-enter
" for the breach of other covenants. I am therefore acting in accordance with the spirit
" of the Procedure Code in allowing the defendant (if he can do so) to justify his posses-
" sion on the ground of breaches of covenant other than, and not restricting him to, the
" breach complained of in the letter dated July 24th. On the third issue I therefore
" find for the defendant.

" This necessitates a consideration of the fourth issue.

" Have the plaintiffs committed any other breaches of covenant, whereby a right of " re-entry has accrued to the defendant? It is contended that they failed to deliver " plans, and have ceased to build, or rather have not continuously carried on their build- " ing operations. I hold that neither of these objections will (protect*) the defendant " in justification of his re-entry. The failure to deliver plans was " not a breach of a condition whereon a right of re-entry was to " accrue: that right was to arise on the happening of one of three events, *viz.*,—if the " plaintiffs should fail to pay rent, or should not within one year from the day of their " being let in to possession commence to build; or should not within three years from " the last-mentioned day erect or construct a building, &c.

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" The defendant, then, cannot rely on the failure to deliver plans as conferring on " him a right of re-entry; nor has a right of re-entry accrued to him from the failure to " continuously carry on the building. At the time the defendant re-entered, the plaintiffs " had more than a year's time (computing even from the time when they actually were " let into possession) in which they might strictly have complied with the terms of their " contract, and have constructed the building which they had covenanted to erect, and " there is no proviso that they should *continuously* carry on their building operations. " On this issue I find for the defendants, and, so finding, it is unnecessary for me to " consider the fifth issue.

" On the sixth issue I am of opinion that there is nothing in the circumstances of the " case to disentitle the defendants to the relief which, if my finding on the second issue " be correct, it is in the power of this Court to grant them. It is alleged on the part of " the defendants that the plaintiffs have no *bonâ fide* intention of fulfilling their contracts; " that they have secured the sites demised with a view of excluding competition by pre- " venting the erection of an hotel which might compete with that which they at pre- " sent occupy in Lot No. 3; but I do not think it is established that the plaintiffs " have not a *bonâ fide* intention to do all that their contracts have bound them to do. " They had, at the time their possession was interrupted, more than a year before them " in which they might have erected buildings which would have satisfied the conditions " of the contracts.

" Those contracts state that the buildings are to be 'dwelling-houses;' and do not " restrict the plaintiffs to the erection of an hotel, and, on the principle of law that evi- " dence ought not to be admitted to vary a written instrument, I think I am not jus- " tified in considering any alleged understanding between the parties at the time the " contract was entered into, but that I am restricted to an interpretation of the clear " words of their contracts. Nor, with regard to the failure to deliver plans, are the plain- " tiffs, in my opinion, disentitled to the relief they seek. They might, in the time re- " maining to do so, have submitted proper plans, and if their delay in doing so had entailed " upon them penalties, the defendant might have sued to enforce such penalties; but, " inasmuch as such failure was one that could be amply compensated for by the penal- " ties or damages, I do not think it can be relied on in bar of this suit. Inasmuch, " then, as the plaintiffs tendered the rent within a few days after it became due, and no " particular damage accrued to the defendant from the delay, I hold that the plaintiffs are " entitled to a decree.

" I have now only to consider the question of costs. The suit has been necessitated " by the omission of the plaintiffs to fulfil their contracts.

" It is abundantly clear that in re-entering in the name of the defendants, the Col- " lector has acted in a spirit of good faith. It is his duty, as representing the defendant, " to exercise all rights which have lawfully accrued to the defendant, and to exercise " those rights with a view to the public good.

" The Collector has not, in my opinion, acted with any degree of hardship towards " the plaintiffs in endeavoring to assert the defendant's title to the property, so that it

"might be made more speedily beneficial to the public than it would have been left to "the dilatory action of the plaintiffs. I therefore decree that the plaintiffs are entitled to "the possession of the demised sites, and that the forfeiture of the leases be annulled on "payment within one month from the date of this decree of the rents due, and interest "at 6 per cent. per annum up to the time when the (rents *) "were tendered, and on payment of all costs incurred by the "Collector in re-taking possession, and that the plaintiffs shall pay the costs of all parties "of this suit—such costs, in the event of any difference between the parties, to be settled "by the Registrar of this Court.

* Blank in original.

"*The 31st January*, 1867. (Sd.) "C. A. TURNER."

33. The remaining cases that the Board have to notice are commented on more with a view to impress upon District Officers and others the necessity of care and attention in dealing with the cases in which Government is interested than for any other purpose.

Chotah Lall *versus* Collector of Furruckbad.

34. The Board draw attention to this case as illustrating a want of care on the part of the Collector and Commissioner which has been detrimental to the Government interests.

35. The plaintiff in this case sued to obtain possession of certain property attached by the Collector as intestate, but to which plaintiff laid claim as adopted son of the deceased proprietor.

36. The claim—which was very doubtful, and on that account alone was brought to a hearing in the Civil Courts—was decided against Government on the 25th March. The Government Vakeel failed to obtain a copy of the decision till the 20th April, after having spent only one day in procuring the copy. The term of appeal expired on the 26th April, but the case was not reported by the Collector till the 29th April, and this letter was not forwarded by the Commissioner till the 11th of the next month.

37. The Board consider that in this case there were good grounds of appeal against the decision, in so far as it burdened the Government with costs. These grounds were never pressed by the Local Officers, and, in consequence of the delay evinced by the Government Vakeel, and the want of despatch in the offices of the Collector and Commissioner, the Government is now unable to contest an award which might fairly have been appealed. The Board have called upon the Commissioner for a report on the Government Vakeel's conduct, and will determine on receiving it whether the latter officer shall be allowed to retain his post.

Sahee Ram *versus* Collector of Scharunpore.

38. In this case, owing to the neglect of the District Officer (Mr. H. D. Robertson) in complying with the orders of the Commissioner, the Government has been cast in costs amounting to Rs. 100. The Board have addressed the following letter to the Commissioner :—

*From Secretary to the Board of Revenue, North-Western Provinces, to the Commissioner of the Meerut Division* (*No.* 343).—*Dated 4th July*, 1867.

"SIR,—I am directed to state, in reply to your letter No. 371, of the 17th "ultimo, furnishing an explanation of the reason why the money was not paid by the "Collector to Sahee Ram when authorized to do so in May last, that the Board "of Revenue consider the explanation as very unsatisfactory.

"2. When the Collector found that he was unable to comply with your orders of "May, 1866, he should have reported the cause of his inability, and have taken mea-"sures to obtain sanction to the disbursement from some other source.

"3. The consequence of this neglect is that Government has now to pay the "sum originally due, with heavy costs in addition; but, in the opinion of the Board, "the Collector must pay the costs. If he wishes, the case can be referred to Govern- "ment."

Rae Mohun Lall *versus* Government.

39. This was an action brought by a contractor to recover the value of material delivered to the Executive Engineer, Allahabad. It has been decided against Government. The circumstances of the case and the grounds of the judgment are given at length in the decision.

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*Original suit No.* 16, 1866.

Baboo Rai Mohun Ghose, Plaintiff.

*versus*

Major A. W. Owen, on the part of Government, and Baboo Kally Coomar, Defendants.

*Claim to recover Rs.* 2,142, *principal and interest, together with future costs and interest, on account value of Rs.* 20,000 *cubic feet of rubble-stone at Rs.* 10-8 *per* 100 *cubic feet, as per letter No. dated* 1*st August,* 1865.

"THE plaintiff states that he received a contract from the Executive Engineer "for the above stones at the above-mentioned price, and he files a letter from Executive "Engineer approving of his tender, and directing him to carry it out. This letter is ad- "dressed to Rai Mohun.

"The defendant, Kally Coomar, replies that he was proprietor of the stones referred "to, and that plaintiff had nothing to say to them.

"The Government defence is separately filed, and is to this effect:—That plaintiff "did receive a contract, as above stated. Subsequently Kally Coomar got a large con- "tract for two lakhs of cubic feet of rubble, entered into partnership with Rai Mohun, and "took the whole of the rubble he had collected, and received payment for it from Execu- "tive Engineer. That Government had paid for the whole, and if Rai Mohun had any "claim, it was against Kally Coomar.

"Plaintiff, Rai Mohun, files a letter from Executive Engineer—No. 2554, of April 6th, "1866—in which he is referred to as a contractor with a claim for 20,000 cubic feet of "rubble, and stating that in the meantime the Executive Engineer had given credit of "Kally Coomar for all the rubble received at the ghât, and that Kally Coomar had "refused to pay any attention to the Executive Engineer's request that he would attend "when Rai Mohun was present and settle the dispute.

"Plaintiff further files a bundle of letters and vernacular orders from Executive "Engineer, in which he is treated as the contractor for this stone, and received instruc- "tions for its disposal.

"The Vakeel conducting the case on behalf of Government argues that it is evident "that plaintiff was Kally Coomar's partner; that he submitted to have this stone mea- "sured as Kally Coomar's, and made no objection for many months, until he had a quar- "rel with Kally Coomar in February, when he brought this suit against him and Gov- "ernment for stone, which had been accepted in the partnership by Kally Coomar; and "that plaintiff has gained by this, for plaintiff's contract was for Rs. 10-8 and Kally "Coomar's for Rs. 11-8, and so he gains by giving over the stone to Kally Coomar; "and that the quarrel between plaintiff and Kally Coomar was to this extent, that he "prosecuted Kally Coomar in the Magistrate's Court, and got him fined Rs. 500.

"Kally Coomar's Vakeel argues that Kally Coomar is *malik* of this stone, for that "it is evident that they were partners; so anyhow there is no separate property of

" plaintiff in this stone apart from Kally Coomar, and he may sue Kally Coomar, for " adjusting accounts, as is common amongst partners; but that his case for their whole " value falls to the ground, for either they are half Kally Coomar's, or his suit is good " against Government alone.

" Plaintiff states he has associated Kally Coomar in this case because he has in- " cluded this stone, which is entirely plaintiff's, in that stone collected by them jointly " on their joint contract; and so he does not sue to clear up his accounts with Kally Coo- " mar on their joint affairs, but merely to rescue from Kally Coomar stone exclusively " the property of plaintiff of which Kally Coomar has taken possession, and is a separate " affair entirely from their contract.

" The facts of this case appear to be that the Executive Engineer, under sanction " from the Superintending Engineer, gave a contract to plaintiff for 20,000 cubic feet of " rubble stone at Rs. 10-8 per 100 cubic feet. This letter was forwarded to Rai Mohun, " the plaintiff, on August 1st, 1865, from which date this contract may be considered " to commence. In accordance with this contract, plaintiff brought a quantity of stone, " which he says is 20,000 cubic feet, to the bank of the Jumna on September 1st, 1865, " and reported that he had done so to the Executive Engineer on September 2nd. A " signature of the Executive Engineer, Captain Maitland, proves this report was accepted, " and is admitted by the present Executive Engineer. After this, a further rate was " offered to plaintiff to transport this stone within the Fort, where it is required, but this " was never effected, as plaintiff was never shown where the stone was to be stacked, " and his stone, and large quantities besides, are outside the Fort to this day, so plaintiff " stands on his former terms of Rs. 10-8 per 100 delivered near the Fort.

" The letters from Executive Engineer regard this stone as being actually lodged. " There is nothing to show there was any objections made at the time, and I think it " can be, and must be, accepted that plaintiff did lodge the stone at the appointed place, " in pursuance of his contract. Plaintiff has never been paid for this stone: this is ad- " mitted by the Executive Engineer, for reasons which will be subsequently given.

" Plaintiff was pressed to explain why he neglected to push his claim for payment " for this stone. He says he did ask for it more than once, but he did not press it. Hence, " as he was a sharer in another contract, and his stone being lodged and he being away " at the quarries at his work, he had no opportunity to press the matter much in " person, but he did so through his partner, and he eventually got an order from the " Executive Engineer that if he wanted his money he must institute a civil suit for it. " On this decisive answer plaintiff brings this suit.

" Now another transaction of the Executive Engineer's office must be related.

" On September 2nd the Executive Engineer issued a notification for a further con- " tract for the supply of two lakhs of cubic feet of rubble. The tender of Kally Coomar " alone for this contract was given in on September 10th. He signed the specification, " binding himself to its terms, and his security bond is dated 6th October, 1865. These " documents are marked B.1, B.2, B.3; they are in Kally Coomar's name alone. " Kally Coomar entered, on taking this contract, into an agreement with plaintiff to work " it together. Its terms are Rs. 11-8 per 100, and Government to find a tramway, and " other conditions. Plaintiff says this agreement was not *pukka*—that is, he has no formal " stamped agreement. Kally Coomar's Vakeel is asked if he can produce it: he says un- " fortunately his client is absent, and cannot be referred to at once;—the truth being " that he is an absconder from Civil process and his effects are under attachment by his " creditors, and he cannot produce this agreement of contract; but he does not contest " the fact that the contract existed. And now comes the main point at issue; Kally " Coomar, in pursuance of this contract, has deposited quantities of stone on the river " bank near the Fort. All the stone there has been measured up by the Executive En- " gineer, and payment been made to Kally Coomar. The Executive Engineer has

"assumed that plaintiff and Kally Coomar being partners, and payment for all the stone "lodged being made to one partner, he has nothing further to say to plaintiff's claim "against him. Certainly there is nothing before the Court to shew that the two trans- "actions—the first with plaintiff and the second with Kally Coomar—were ever merged "into one by the parties or by the Executive Engineer: the joint names of the parties do "not appear in either; the dates are different, so are the terms. The completion of the "first contract is accepted by the Executive Engineer. It is evident from the dates that "the fulfilment of one, as far as the depositing the stone, was complete before the other "was commenced. I cannot see what ground the Executive Engineer had to repudiate "the first contract, or to consider that the two were merged, the latter including the "former. I have no doubt that payment has been made by his office, but he has paid "the wrong man for the first contract, and a decree must be given against him, with "interest.

"Then there remains to decide what is plaintiff's claim against Kally Coomar. "Kally Coomar's Vakeel urges that it is only a case of partners falling out and disputing "shares, and that in its present form plaintiff's case cannot stand against Kally Coomar, "for plaintiff wants the whole, whereas, being a partner, he can only claim a share. But, "for the reasons above given, I consider the partnership occurred subsequently to the "completion by plaintiff of his first contract, with which Kally Coomar has nothing to "do. He admits he has been paid for *all* the stone deposited; so, in fact, he admits hav- "ing taken into the joint stock that stone which I have shown is exclusively plaintiff's, "and to have received payment for it, so he appears to have been rightly associated in "the defence. It seems to me that Kally Coomar should by rights be criminally pro- "secuted for this misappropriation, for he must have been aware the stone was not his "when he tendered it as his own to Government, and when he was the go-between re- "garding payment for the stone between plaintiff and the Executive Engineer, he "evidently deceived the Executive Engineer regarding this stone, and also in the mat- "ter of the partnership between himself and plaintiff.

"As I have decreed the cost of this stone against the Executive Engineer according "to the original contract terms at Rs. 10-8 to plaintiff, there remains but to add that, "should plaintiff not succeed in getting this money, through any errors in this judgment, "he is certainly entitled to the 20,000 cubic feet of stone from Kally Coomar, from whom "the Executive Engineer is entitled to recover its costs, obtained under misrepresenta- "tions; but this must be the subject of a separate suit.

"The Government Vakeel presses for a decree against Kally Coomar direct, instead "of against the Executive Engineer; but I do not see how this can be, for the transac- "tion between the Executive Engineer and the plaintiff appears to have been quite dis- "tinct from any transactions between plaintiff and Kally Coomar, or between Govern- "ment and Kally Coomar after plaintiff joined the latter in partnership. Kally "Coomar's name nowhere appears in this transaction between plaintiff and the Execu- "tive Engineer, and this fact alone would be sufficient to relieve him from a direct "decree against him.

"The papers marked B.1, B.2, B.3 are returned to the Executive Engineer, who "will file copies.

"Kally Coomar's costs to be charged to the plaintiff.

(Sd.) "G. RICKETTS,

"*Officiating Judge.*"

40. This case is remarkable as the Government by the decree thus obtained against it is now compelled to pay a second time for material, the price of which has already been paid to another person. As observed by the Judge in his order refusing the application for review of judgment, "the facts of the case certainly show great laxity

"on the part of the officer in charge of the Executive Engineer's Office at that time, "both in not taking care to see that the proper quantity of stone had been delivered "by Rai Mohun in fulfilment of his contract, and also that the cost of the said 20,000 "cubic feet of stone was paid to him, not to Kallee Koomar, who had nothing whatever "to do with the first contract. No blame attaches to Lieutenant-Colonel Owen, who, "as Executive Engineer, has now conducted the case on the part of Government."

41. This case originated in the action taken by the Magistrate of Benares, who issued an injunction to the plaintiff, desiring him to close a bazaar which the latter had opened.

Boyrodial *versus* Barnabas and Magistrate of Benares.

42. It is noticed as illustrating the necessity for careful attention to orders and procedure on the part of the Magistrates. The Magistrate had recourse to Section 62 of the Code of Criminal Procedure, and in doing so neglected to comply with the orders of the Nizamut Adawlut (Circular Order No. 16 of 1865), dated the 17th August, 1865.

43. The Circular in question, referring to Section 62, and Chapter XX. of the Code, proceeds,—

"The law in both the passages cited authorizes certain action on the part of the "Magistrate with the view of preventing obstruction, annoyance, or injury, or the "risk thereof, to the community, or members of the community. But the terms of "Section 62 are very general and permissive, while the provisions of Chapter XX. are "particular and restrictive."

"The Court do not think that it would be a correct interpretation of the law to "leave it with the Magistrate to have recourse to either Section 62 or Chapter XX., "at his option; for naturally the simpler and more arbitrary procedure of the former "Section would generally be preferred, and the wholesome restrictions laid down in "Chapter XX. would be nullified.

"They are therefore pleased to rule that whenever any act or proceeding which "the Magistrate deems it necessary to prohibit or direct falls within the category "defined in Section 308 of Chapter XX., he shall be bound to follow the procedure "enjoined in the said Chapter, even though such act or proceeding may also appear to "fall within the terms of Section 62."

44. The Magistrate has been directed as to the proper course he should pursue. He has withdrawn his injunction, and the plaintiff has withdrawn his suit.

45. This case, which is now in appeal to the High Court, illustrates remarkably the necessity for careful supervision on the part of district authorities, extending even to minute details in regard to all orders issued by them or with their sanction.

Sheikh Mahomed *versus* Collector of Mozuffernuggur.

46. In the case now noted, the absence of such supervision in a very trifling matter has nullified the orders of the administrative authorities, and has opposed very serious, if not insurmountable, obstacles to the due fulfilment of the intentions of Government in regard to the rebel Mahomedans of Thannah Bhowan.

47. The facts of this case are as follows:—The property of the Mahomedan rebels at Thannah Bhowan was confiscated. It was determined to sell the estate, but both the Collector and the Commissioner were particularly anxious that the sale should not be made with the rebels, or with any of their connections. Sanction was obtained to the course proposed, but in drawing up the notice of sale, a condition, usual in ordinary sales, was entered to the effect that the sale could be made to the highest bidder. The condition ran thus:—

"The sale will be concluded with the highest bidder, without any regard to the "fact that the purchaser is a rebel. Any party wishing to purchase is at liberty to "do so."

The sale took place, and the rebel ex-proprietors were the highest bidders; but the Deputy Collector conducting the sale, when receiving their bid, informed the bidder that the sale could not be completed if the sanction of the Collector was not obtained.

The Collector refused to sanction the sale, and on his and the Commissioner's representation the estate was eventually disposed of privately.

The rebel ex-proprietors then sued for specific performance of the contract which they avowed had been entered into with them under the notice of sale. Their suit was unsuccessful in the Court of first instance, but in appeal was decreed by the Judge. It is this latter decision which has now been appealed. The Board felt the great difficulties of the case, but it was a matter of vital importance to the interest of the loyal inhabitants of Thannah Bhowan that the decision should be set aside. In the main points of appeal, it is probable that the Government will be unsuccessful; but the Board has urged, the plaintiff having sued for specific performance, that the decree, if adverse to the Government, should only be for damages, and not for completion of the sale, and they are sanguine of success on this point.

48. The only remaining case requiring notice is the suit of the Maharajah of Domraon *versus* Government. This, as far as it has gone, has been adverse to Government; but the case is still virtually pending, as an appeal has been made to the Privy Council by the co-respondents in this suit, the result of which will determine the matter in dispute. This case will be reported when the results of the appeal are known.

I have the honor to be,
SIR,
Your most obedient Servant,
W. C. PLOWDEN,
*Secretary.*

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No. 393A. OF 1867.

FROM

C. ROBERTSON, ESQUIRE,
*Junior Secretary to the Government,*
*North-Western Provinces,*

To

W. C. PLOWDEN, ESQUIRE,
*Secretary to the Board of Revenue,*
*North-Western Provinces.*

DATED NYNEE TAL, THE 12TH OF OCTOBER, 1867.

SIR,

JUDL. (CIVIL) DEPT., N. W. PROVINCES.

I am directed to acknowledge the receipt of your letter No. 602A., dated the 15th August last, in which the Board of Revenue report, in their capacity of Legal Remembrancers, on the litigation to which Government has been a party for the year 1866-67.

2. It is observed that the Commissioner of Allahabad was the only Commissioner who submitted his report at all near the due date. The last received was the report of the Commissioner of Agra; and I am to request that the Board will convey to that officer an expression of the great dissatisfaction of Government at his delay in submitting it.

3. A copy of your letter will be forwarded to the Public Works Department of this Government, and attention called to the case noted in the margin, in order that such instructions as seem to be required may be issued.

Original Suit No. 16 of 1866. Baboo Rai Mohun Ghose, Plaintiff, *versus* Major A. W. Owen, on the part of Government, and Baboo Kalee Koomar, Defendants.

*4th.*—I am to point out that the Circular of the late Nizamut Adawlut, referred to in paragraph 42 of the report, has been cancelled.

*5th.*—With reference to the 33rd and following paragraphs of the report, I am to request that the Board will instruct Commissioners and Collectors to take care that all cases to which Government may be a party shall be conducted with the greatest care and regard for the rules of procedure; that diligence shall be used in the conduct of these suits, informing them that where it appears that reasonable care and diligence have not been shown, and that loss or injury has been incurred in consequence, the officers concerned will be held personally responsible.

*6th.*—In conclusion, I am to convey to the Board the thanks of Government for their careful report.

I have the honor to be,
SIR,
Your most obedient Servant,
C. ROBERTSON,
*Junior Secy. to Government, North-Western Provinces.*